83-1920

No.

IN THE SUPREME COURT OF THE UNITED STATES

(_____ term, 19_____)

RICHARD L. WINDSOR,
Petitioner,

v.

THE TENNESSEAN, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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33 pp

(a) **QUESTION PRESENTED FOR REVIEW:**

Whether a summary sua sponte appellate application of collateral estoppel contrary to principles laid down in **Montana v. United States**[1], with no resort to the record of the collateral proceeding and only a paraphrased interpretation of the purported collateral findings there, is such a wide departure [2] from the accepted and usual course of judicial proceedings as to amount to a denial of **due process and fundamental fairness** calling for an exercise of this Court's supervisory powers.

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1. **Montana v. United States**, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979).

2. Under the circumstances of this case, an interlocking circle of summary dismissals in two different court systems, with no discovery allowed and where the estoppel is the **only** obstacle to Petitioner's proof of actual malice:

(1) There was never any proponent of the estoppel. There was **no** proceeding in which any party met the burden under **Montana** (supra) of showing that the requirements of estoppel had been met.

Respondents' counsel instead sent a letter paraphrasing the holding (not the issues actually litigated and decided) in the collateral proceeding in the state appellate court to the federal court clerk. (App. p. 33).

The letter did not mention issues which the state appellate court had declined to treat or decide, and did not identify any evidence in the state record upon which the state court could have decided the other issues which, in fact, it passed over without findings.

From this the federal appellate court fashioned a sua sponte estoppel on issues never decided in the state appellate court. The federal appellate court paraphrased either the letter from Respondents' counsel or the opinion of state

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appellate court. No resort to the record in the state proceeding was had. (719 F.2d 155, at App. 11).

The state appellate opinion was issued on April 26, 1983. Counsel's letter to the federal court clerk was two weeks later, dated May 12, 1983. (A petition for a writ of certiorari from this Court seeking a review of the fairness of the state proceeding was not even ruled on until February 21, 1984.) (No. 83-5611, cert. den. 52 LW 3611).

But the federal appellate opinion paraphrasing the state appellate opinion was issued on October 12, 1983 (after arguments in 1982).

In their November, 1983, reply brief in this Court, Respondents admitted that the **only issue** before the state appellate court was whether (particular) published articles were substantially accurate accounts of a judicial proceeding. The paraphrased estoppel in the Sixth Circuit five months earlier was applied by implication to **other** issues and publications which were not published reports of a judicial proceeding. These publications were based on "private acknowledgments" to newspaper reporters by a co-defendant in the federal case who was not a defendant in the state libel claim. These publications had been passed over in the state court findings because there was no evidence on them in the record, and were in fact not decided, and Respondents admitted in this Court five months later that the state appellate decision had involved **only** evidence on the accuracy of published reports of a judicial proceeding;

(2) the federal appellate decision found the original summary dismissal in the federal district court in 1981 to be error, but then affirmed that dismissal on other grounds, (i.e., the sua sponte application of the estoppel paraphrasing the 1983 state appellate opinion). An important issue showing actual malice had been protected from exposure by protective orders, etc., in the federal district court and had been taken out of Petitioner's reach by a summary dismissal there in 1981 **at a point where his pending motion for a Determination of the Sufficiency of a defendant's answers under Rule 37** would have exposed and **proved** the actual malice.

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(b) **LIST OF ALL PARTIES TO THE PROCEEDING.** The caption of the case in this Court does not contain the names of all parties to the proceeding. (The caption and parties are not identical to those in No. 83-5611 formerly before this Court; the former petition arose to this Court from a judgment in the state courts of Tennessee and this instant petition arises to this Court from a judgment of the United States Court of Appeals for the Sixth Circuit.)

Petitioner: **Richard L. Windsor**

Respondents: **The Tennessean** (newspaper), **John Seigenthaler** (publisher and editor), **Wayne Whitt** (editor), **Carol Clurman** (reporter), and **Hal Hardin** (former U.S. Attorney for the Middle District of Tennessee - defendant below in this action but not a defendant in No. 83-5611 (supra, this heading).

In applying the sua sponte estoppel by paraphrasing, the federal appellate court foreclosed issues never litigated or decided anywhere.

(c) TABLE OF CONTENTS

(Appendix assembled as a separate document and filed herewith.)

TABLE OF AUTHORITIES

Cases:

(d) **A REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS.**

(1) The opinion of the federal appellate court (applying the collateral estoppel) sought to be reviewed is reported at **Windsor v. The Tennessean, et al,** 719 F.2d 155 (6th Cir. 1983, reh. den. 1984).

(2) The opinion of the state appellate court whose findings are paraphrased by the federal appellate court and applied as the collateral estoppel is reported at **Windsor v. The Tennessean, et al,** 654 S.W. 2d 680 (Tenn. App. 1983), cert. den. (No. 83-5611) S. Ct. ____, 52 LW 3611, (2-21-1984).

(3) The Memorandum and Order of the federal district court (M.D. Tenn.) denying, inter alia, Petitioner's motion in 1981 for a Determination of Sufficiency of Responses is unreported. It also dismissed the claims which thereafter went to the federal appellate court and were treated in (1), above. It also remanded the state causes of action back to the state trial court, one of which was then treated, with some factual issues being decided, in (2), above.

(4) The Order of the state trial court (Circuit Court for Coffee County, Tennessee) denying Respondents' motion for summary judgment is unreported and was entered on February 16, 1982. An interlocutory appeal of that Order was taken on issues upon which Respondents had adduced evidence in the trial court and raised only issues concerning one of four state causes of action remanded by the federal district court in (3), above.

(5) The Order of the federal district court (M.D. Tenn.) entered on March 5, 1984[3], (discussed p.18, infra, Statement of Case):

(a) refusing to allow Rule 26 (e) supplementation of the 1981 Responses referred to in (3), above;

(b) refusing to allow Rule 60 examination or

correction of factual misrepresentations in the record;

(c) characterizing these efforts by Petitioner as an impermissible attack upon the federal appellate decision in (1), above, (which had estopped Petitioner by paraphrasing findings from (2), above,) is unreported.

(It has **now** been filed in the state trial court in support of Respondents' efforts to obtain application at the state trial level of the paraphrased implication of the collateral estoppel in (1), above, to **all other issues and causes of action** remanded in (3), above, denied summary dismissal in (4), above, never included or decided in the state appeal in (2), above, but **nontheless** paraphrased by the Sixth Circuit decision (1), above, from which this petition arises.)

(e) A STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on October 12, 1983.

(ii) Petitioner filed a timely petition for rehearing which was denied. The government was granted a 30-day extension of rehearing time, until November 25, 1983. The government's petition for rehearing dated November 23, 1983, was denied by the Sixth Circuit in an order dated January 23,1984.

(iii) n/a

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 USC 1254(1).

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3. Petitioner does not herein seek any review concerning this Order.

(f) THE CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES.

The judgment sought to be reviewed rests on an application of collateral estoppel in conflict with this Court's decision on **Montana v. United States**, 440 U.S. 147, 99 S.Ct. 970, 59 L. Ed. 2d 210 (1979). Petitioner believes that the judgment, the procedure and the results flowing from it involve a question of Fundamental Fairness under the **Due Process** provision of the Fifth Amendment:

> **"No person shall be ... deprived of life, liberty, or property without due process of law;..."**

Questions involving the Constitutional guarantee of a jury decision of disputed factual issues under the Seventh Amendment may also be presented:

> **"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."**

(g) STATEMENT OF THE CASE.

Petitioner was formerly an Assistant United States Attorney in the Middle District of Tennessee. He had been appointed to that office via statutory authority (28 USC 542) pursuant to the Appointments Clause (United States Constitution, Art. II, Section 2(2.). Only the Attorney General had authority to remove him (also delegated to the Deputy Attorney General).

Before the 1980 presidential election federal criminal investigations had commenced in the District which later resulted in the conviction of the

former Governor of Tennessee[4], his Legal Counsel[5], and several others in that state administration.

Investigations assigned to Petitioner had uncovered bribes in state executive clemency and corrections matters. The course of these investigations angered a powerful state political figure who was the publisher of the largest newspaper in the District. He was told that his name had been brought up in grand jury testimony presented with Petitioner's assistance. The investigations would show that the powerful publisher was implicated in meetings of a properly questionable nature with subjects later convicted in both the corrections matters bribes and the liquor license extortions. The alleged meetings were contemporaneous with other events and matters playing important roles in the state official's subsequent convictions.

The newspaper publisher complained to the U.S. Attorney in a fit of rage about Petitioner. (See 719 F. 2d,161-162, App.2-3). The U.S. Attorney called in Petitioner and pressed for abandonment of the sensitive investigations, although he had proclaimed publicly in the publisher's newspaper that he had "recused" himself from any involvement in them. Petitioner did not agree with the appointed supervisor's suggested abandonment of these matters and pointed to the "recusal".[6]

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4. See **United States, v. Blanton**, 700 F.2d 298 (1983) Vacated 703 F.2d 981 (1983), (6th Cir. 1983, cert. den.____ S.Ct.____, ____ LW ____, 1984).

5. See **United States v. Sisk, et al**, 629 F.2d 1174, (6th Cir. 1980).

First the U.S. Attorney "transferred" Petitioner to the Civil Section of the Office at the beginning of 1980. Within days the newspaper publisher made another personal angry complaint to Petitioner's U.S. Attorney supervisor, this time threatening reprisals. The newspaper publisher had tape recordings of the U.S. Attorney in a separate sensitive matter.

Petitioner was soon attacked in newspaper accounts of the criminal prosecution sensitive to the publisher, and was depicted as acting in disobedience to a (non-existent) court order. The news articles inferred that Petitioner had been ordered to return to defendants in the case certain evidence, including an incriminating letter concerning a bribe transaction implicating state official Sisk[7] and the other subjects who had been implicated in the alleged meetings with the politically influential newspaper publisher.

Petitioner was then told to resign. He declined. The supervisor explained that he had been told the newspaper was planning a large editorial attack and that they weren't going to quit until they had hounded Petitioner out. Then the supervisor hurriedly took the sensitive case away from Petitioner and dismissed it. But the editorial still materialized. It misrepresented Petitioner's disobedience to the (non-existent) court order and threatened the U.S. At-

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6. There is no indication or claim whatsoever that Petitioner was insurbordinate or refused to follow instructions, and no similarity to **Connick v. Myers**, 455 U.S. 999 (1983). Petitioner was bound by the Code of ethics for Government Employees (28 CFR Appendix):

"Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department.

"Expose corruption where ever it is found."

torney with the tape recordings. It threatened to call for a full scale investigation of the U.S. Attorney's office three months before the presidential election.

The day the editorial was published the supervisor took it to the U.S. Attorney's Conference in Portland, Oregon. There he took it to his own supervisor, who also had no authority to remove Petitioner or to termnate his employment. The supervisor used the editorial to **propose** Petitioner's removal for **unsatisfactory performance.**[8]

(On the next day back in Tennessee another editorial was quickly published, retracting and admitting that representations about Petitioner in the previous day's editorial were "technical misstatements".) But on that same day in Portland the Nashville U.S. Attorney and his supervisor decided to take the newspaper article and the proposed removal to the Deputy Attorney General, immediately, at a social reception and present it to him "informally". They did so. The U.S. Attorney represented that Petitioner had acted in disobedience to a court order and that the "problem" required "immediate action".[9].

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7. In his earlier 1979 prosecution on official corruption charges Tennessee state official Sisk had escaped jeopardy via a mistrial after he had gone to the newspaper publisher's home late one night during his trial with a story of an ongoing jury tampering scheme which was then sensationalized on the front page of the publisher's newspaper and infected the jury. (See 629 F.2d at 1176-1180.)

8. Petitioner believes that a right to notice and an opportunity to respond was triggered by the **proposed** removal of an excepted service employee for **unsatisfactory** or **unacceptable performance** and under **these** circumstances. He

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believes it to be a right standing in a posture somewhat like the right identified by this court in **Carey v. Piphus**, 435 U.S. 247, 55 L.Ed.2d 252, 98 S.Ct. 1042 (1978) which might be overshadowed by other subsequent facts and made difficult to see. Petitioner does not assert that it eclipsed, diminished or infringed in any way upon the Deputy Attorney General's exercise of delegated statutory authority to remove federal prosecutors. Petitioner does not contend that it raised or created any "property" rights in his federal employment. (See 5 USC 4303, 5 CFR 432.205 and 45 FR 13432.)

In this context the right is something like the track of a small animal which is quickly obliterated by the superimposed track of a larger animal which followed just behind it. In this case the subsequent exercise of his unconditional right to remove federal prosecutors by the Deputy Attorney General would obliterate the right described if it were urged in an action against him or the government. The Deputy's action is like the track of the larger animal. Petitioner has pointed to the record of facts and tried to show the federal courts, "See, the small animal was here." But the federal courts have said, "No, we see the track of the large animal."

Petitioner has **never** sought reinstatement, **never** sued the Deputy Attorney General, and never sought judicial review of the Deputy's later decision to remove him made in reliance on the newspaper article. He has always believed the Deputy was misled.

It is a question of **first impression** under the Civil Service Reform Act, which first created the rights to notice and an opportunity to respond for **excepted service** federal employees **where** removal is proposed for unsatisfactory performance, and under the facts of this case which was brought in a conspiracy action against a federal supervisor who had no authority to make a decision to remove the employee and could only propose it to higher-ups. Petitioner did not urge or elaborate upon this question upon the first page of this petition because it is not necessary to the decision of the serious due process denial posed by the collateral estoppel. But it may be a "subsidiary question fairly includ-

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Four days later Petitioner was ordered to the Deputy's office in Washington and handed a letter announcing his immediate termination. It listed accusations taken from the publisher's newspaper. It included a charge that Petitioner had acted in **defiance** of a court

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ed" (Supreme Court Rule 21(.1)(a) in the opinion which seeks to analyze whether statutory rights were denied. If this Court is inclined to think on this question in its review of this petition, a reading of 5 USC 2302(b)(2) is probably necessary; when the word "consider" in the first line of that subsection and the word "records" in the fourth line are placed beside the use of the newspaper articles in this case, the track of the small animal suddenly becomes visible when the conduct of a supervisor with only authority to recommend (5 USC 2302(b) is in the mind of the thinker, but it fades from sight once again if the discretionary independant removal power of the Deputy under 28 USC 542(b) enters the mind of the same thinker. But then the distinction is no more difficult than the one this Court made in Carey v. **Piphus**, which didn't seem difficult at all.

Once the track of the small animal is seen, 28 CFR 16.56(9) and (10) shows clearly what direction it was traveling at the social reception "informal" removal proposal. If the reader of this paragraph has read this entire petition, the Sixth Circuit opinion in the case, or even the complaint, then the illumination cast on the track by 18 USC 1001 brings quickly to mind the observation of Justice Holmes nearly a hundred years ago that judges shy away from questions of policy because in such decisions they become bereft of the illusion of certainty which makes legal reasoning seem like mathematics (infra, p.24). Some federal judges may think the question of whether a federal supervisor is answerable for misrepresentations in a proposal of a subordinate's termination presents a difficult policy question. Others may see it as a question capable of answer by resort to legal reasoning with little or no difficulty.

9. The Deputy Attorney General submitted an affidavit explaining all this in the district court. He noted that he had heard nothing of the Petitioner, derogatory or otherwise, prior to or after this one incident.

order (See 719 F.2d at 158 n.2, • infra, App. 4). The Sixth Circuit's opinion says Petitioner contests the validity of these grounds for termination. But petitioner has never contested his termination or sought any review of the Deputy's decision. He did sue the former U.S. Attorney and the newspaper, etc., alleging action taken in 1980 with malicious intention to cause a deprivation of rights or other injury (cf. **Wood v. Strickland**, 420 U.S. 308, at 321-322 (1975).[10/]

He was advised that if he would resign he would be given 90 days before he had to leave his office and duties, and that if he would sign a resignation form that day before leaving Washington he would be given 10 days in which to make a final decision. Otherwise the letter would be signed and he would be fired immediately. When he undertook to explain that the accusations were false he was told that he had no right to any due process and that the decision and any fact-finding had already been made.

Petitioner returned to Tennessee. Ten days later he notified the Washington officials that he would do as they insisted, and he notified the local press of his decision. Then the Respondent newspaper published an announcement of his impending departure in an article which for the first time revealed that the U.S. Attorney had actually made "private acknowledgments" to the newspaper during the times when he had been portrayed as having "no comment":

> "(the U.S. Attorney) said he was enraged when he found out that Windsor testified in court about the assistant attorney's attempts to block the chief judge's order."

When the newspaper made this revelation the U.S. Attorney telephoned Petitioner in a state of anxiety and read the article to him aloud. He explained that in actuality the newspaper had been told just the opposite of what had been published; that he himself had determined that the true facts were not an attempt to disobey a court order, and that he was not enraged.[11]

When he realized what he was being told, Petitioner made a recording of the remainder of the conversation. He was beginning to see what had been done. Taken together these facts showed that the U.S. Attorney had known the true facts all along. He had told

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10. When the district court in 1981 contended that Petitioner had not alleged a constitutional tort, he pointed out that in 5 USC 552a Congress had held agencies to a standard of care, accuracy and fairness in the use of items of information about individuals, and that the Department of Justice had bound their officers to an even higher standard in 28 CFR 16.56 et seq, particularly sub-sections 9 and 10 of that regulation implementing 5 USC 552a. Petitioner pointed to the express intention of Congress to protect consitituional rights in the statement of Legislative Purpose. Apparently there can be a difference in conduct which deprives one of protections (legislated to protect rights in a constitutionally protected area) and conduct properly termed a constitutional tort.

But this question is not the same question which asks if Petitioner had statutory rights to fairness under 5 USC 552a. (cf. "...conduct (which) does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" ... **Harlow v. Fitzgerald**, 457 U.S. 800, _____ L.Ed.2d _____, 102 S.Ct. 2727 (1982), (And see **Chapman v. National Aeronautics and Space Admin.**, 682 F.2d 526 (5th Cir. 1982) re use of federal supervisor's private materials in a personnel matter, the resulting applicability of 5 USC 552a, and the condemnation of the resulting illegal "ambush".)

the newspaper that he was not enraged at Petitioner after learning the facts and the newspaper had intentionally printed the reverse, with malice. Of greater importance was the fact that the U.S. Attorney had misled the Deputy Attorney General to believe that Petitioner had acted in **defiance** of a court order.

On the last day of his career Petitioner brought an action in Tennessee state court against the U.S. Attorney and the newspaper, etc., alleging a malicious conspiracy to prevent a federal officer from performing his duties and to injure him on account of the performance of his duties. The action was based on 42 USC 1985 (1), "Preventing officer from performing duties." State law torts of malicious interference with employment, civil conspiracy, outrageous conduct, and libel[12/] were also alleged.

The department of Justice entered to represent the U.S. Attorney and removed the case to federal court in Nashville. Certain of the subordinates in the U.S. Attorney's Office prepared affidavits accusing Petitioner of prosecutorial misconduct in the matter of the never-acted-on motion to return the evidence in the case sensitive to the newspaper publisher. When these affidavits were filed in the district court and made public, the defendants in the case involving that evidence filed a motion to suppress based on Petitioner's alleged prosecutorial misconduct. In this instance other of the U.S. Attorney's subordinates represented to the same federal district court that there had been no such prosecutorial misconduct.

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11. The transcript of the judicial proceeding upon which Respondents have relied in every court in which they have received each protective order, each summary dismissal, and finally the collateral estoppel shows there was never any order to return the evidence: (Con't P. 12)

A motion to dismiss was filed by the government on behalf of the U.S. Attorney. It claimed an absolute immunity. A similar motion by the newspaper defendants claimed a constitutional privilege to petition the government for redress was being exercised in the case of the publisher's angry personal complaints and threats to the U.S. Attorney about Petitioner. It was characterized as an exercise of a right or freedom to petition the government for redress of a grievance, and also asserted there had been an absence of malice.

The district court indicated that it was going to summarily dismiss the case on these rationales.

Petitioner then submitted limited Requests for Admission to the U.S. Attorney defendant. The requests addressed the immunity issue and the absence of malice issue. **One Request was for the truth of the facts which lie at the heart of this petition for certiorari:**

> "That on or about July 11, 1980, you met privately with **Tennessean** (newspaper) reporter Carol Clurman and explained to her that you had determined the true facts concerning Assistant U.S. Attorney Richard Windsor's efforts undertaken in order to bring certain evidence before the Grand Jury and that Windsor had not attempted to block the Chief Judge's Court Order and that you were not 'enraged' as she later reported."

(p. 160) THE COURT: "What did Judge Morton do with this Motion to Return?

MR. PRICE: "Your Honor please, he hasn't acted on it..."

(p. 161) THE COURT: "The Motion for Return was not acted upon?"

MR. PRICE: "It was not acted upon."

12. The U.S. Attorney was not a defendant in the libel count of the complaint. (no **Barr v. Matteo** question.)

Not realizing that the words of his own admission of these facts to Petitioner had been preserved, the former U.S. Attorney submitted a false answer to the request. It was framed in an evasive reference to a separate **denial** of his "private acknowledgements" revealed by the newspaper. Both were false and **contradicted** by his own earlier admission.

Petitioner promptly moved for a determination of the sufficiency of these responses, under Rule 36 of the civil procedure rules. But the district court **instead** dismissed the action, save for the state law causes of action against the newspaper defendants. It remanded the latter to the state court in Coffee County, Tennessee. The Order of dismissal in the federal district court found the sufficiency of the Answers to be immaterial, because the former U.S. Attorney was entitled to absolute immunity, period.

There began the interlocking circle of summary dismissals, protective orders and no discovery which fed upon itself and resulted in the summary collateral estoppal by paraphrasal from which this petition arises.[13/]

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13. Petitioner appealed the federal district court's summary dismissal. The appeal took nearly three years and was concluded on January 23, 1984. The Sixth Circuit rejected the notion of absolute immunity and found that the district court erred. The federal appellate court fashioned instead a qualified immunity at the appellate level with no remand for fact finding or other analysis. The opinion called it a threshold question although it had not done so in a similar case involving immunity due the Governor of Tennessee, **Alexander v. Alexander,** 706 F.2d 751 (6th Cir. 1983), argued **after** the **Windsor** (instant) case but decided **before** it. Astonishingly, the Sixth Circuit in **Alexander** said, quoting from **Harlow v. Fitzgerald:**

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> "...if the official pleading the defense claims extra-ordinary circumstances **and can prove** that he neither knew nor should have known of the relevant legal standard, the defense should be sustained.
>
> ...Since the district court placed the burden of proving the qualified immunity defense on the wrong party, we remand this case to the district court for reconsideration of this issue in light of this opinion."

These decisions and their reasoning, both authored by the **same** Circuit Judge, are incompatable. But Petitioner does not seek to raise this knotty question in this petition (unless this Court decides it to be an included question) because he believes it can be explained and resolved **if** the faulty reasoning which gave rise to the summary collateral estoppel by paraphrasal is itself corrected.

There seems to be only one explanation for these exactly opposite results in opinions written by the same Circuit Judge dealing with appeals from the same District involving the same issue and in a chronological sequence which would normally dictate that the lattermost would be conformed to the reasoning of the foremost rather than be its exact opposite.

The reason for this result must be one and the same as the reasoning which vitiated the reasoning in the collateral estoppel by paraphrasal. In the instant **Windsor** case the Sixth Circuit opinion expressly approached the immunity issue as a **threshold question** when in fact the case and the factual record, such as it was (with the former U.S. Attorney's false answers insulated by the district court three years earlier) was **not** at the threshold.

Because of the interlocking circle and its pernicious result, the Sixth Circuit had before it the question of the immunity issue, and the court-protected and unprobed false answers of the Former U.S. Attorney denying the knowledge he had admitted to petitioner. Because these answers also

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After the remand of the state law causes of action, the state trial court refused to grant the newspaper defendants (respondents herein) a summary judgment. But on an interlocutory appeal of that denial in the matter of the **libel issue alone**, the state appellate court made factual findings on certain of the alleged libels (which were publications of what transpired in the judicial proceeding, and not the U.S. Attorney's "private acknowledgements" reported by the newspaper) and remand them to the trial court for entry of summary judgment in favor of Respondents on those allegations.[14]

But a close examination of the state appellate court opinion shows what actually happened. The state ap-

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represented that the newspaper reporter had been truthful it dovetailed with the apparent, albeit unexpressed and nonexistent, finding of the Tennessee Court of Appeals that everything about every article ever written by the newspaper about Windsor was substantially true. But the libel issue was not before the Sixth Circuit. And the false answers of the U.S. Attorney were not before (and not in the record before) the state courts in which he was not a defendant. So when the Sixth Circuit opinion reached over to incorporate the non-existent finding (by implication alone if even there could be such a result in the Law of Judgments) of the state appellate court in the collateral estoppel by paraphrasing, it **seemed** to the Sixth Circuit that the (false but unexposed) answers of the U.S. Attorney in **their** meager record buttressed the imagined finding of the state appellate court on what perhaps **seemed** to be the same question. So the Sixth Circuit opinion must have assumed that the issue was actually litigated and decided **somewhere** and used the comfort or assurance of this thought to support the opinion's decision of **both** the immunity issue (which apparently could not have survived in the face of actual malice) and the newspaper defendants' issues. (In this regard some might say it was reiminscent of the time that Brer Rabbit got stuck to the Tarbaby in the Uncle Remus classic fable.)

pellate court had no factual record before it other than the transcript of the judicial proceeding (submitted by Respondents, who themselves made no affidavits.)

Section IV of the state appellate opinion (App. 26) states:

> "The alleged defamations have been heretofore set forth under six headings, and it is necessary to review these, along with documentation submitted to the trial judge...",

but then the state appellate court proceeded to review only five alleged defamations. It could not have made any factual finding on the published "private acknowledgments" inferring Petitioner's defiance of the court order and the U.S. Attorney's "rage" because it did not take place in the judicial proceeding and could not have been "reviewed along with documentation submitted to the trial judge."[15]

So the state appellate court properly made no finding on the issue[16], and passed over it in their findings.

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14. On approximately November 14, 1983, Respondents filed in the Supreme Court of the United States a Reply Brief in **Windsor v. The Tennessean, et al**, No. 83-5611, which stated to this Court:

> (p.1) "Since they asserted that their motions could be decided by comparing the news articles with the transcript of the hearings. the Respondents also filed motions for protective orders with respect to discovery"
>
> ...(p.3) "The Petitioner did not object to the lack of discovery prior to the trial court's deci-

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sion on the motions for summary judgment. In any case, the only factual issue involved in the motion was whether the published articles were substantially accurate accounts of the Federal Court hearings, and this issue was fully presented by the submission of the transcript of the hearing."

15. The transcript submitted by Respondents showed on p. 56:

> MR. WINDSOR(Answer): "And I explained to the Judge that in the alternative the Judge did go ahead and order it be returned to them, that we would seek an order of impoundment on behalf of the grand jury, because there were a number of people including Eddie Sisk and some of the other defendants who have no standing to object to a search of 2701 Glenrose Avenue. For that reason in my experience and my judgment, it was incumbent upon me to try to preserve this evidence in the hands of the government.
>
> THE COURT: Which judge did you tell all that to?
>
> MR. WINDSOR: Judge Morton in a written fashion."

16. Upon which the complaint alleged:

> "The readers of said newspaper derived, and were intended by the named Defendants to derive, the following meaning from the article: ...that the Plaintiff had done something so improper and contemptible, as an attorney and

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The state appellate opinion was issued in April of 1983. The appeal in the federal appellate court had been briefed and argued late in the previous year. Via the subsequent application of a para-phrasing of the intervening state appellate opinion as a collateral estoppel on all issues but with no resort to the record, the Sixth Circuit foreclosed all issues, not merely those litigated and actually decided in the state proceedings.[17]

During the 90 day period allowed for the filing of this Petition for Certiorari, Petitioner attempted to obtain a Rule 26(e) supplementation (via a Rule 60 motion in the district court) by the government in the matter of the false Answers by the former U.S. Attorney and sought thereby rectification and relief from this misrepresentation which lies enshrined in the record and protected there by the inter-locking circle.

The result was a summary refusal (denying the motions without a hearing) characterizing them as an impermissible attack upon the federal appellate court's decision.[18]

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as an Assistant United States Attorney, that the United States Attorney was enraged when he learned the true facts, and that the true facts included the Assistant Attorney's actual efforts to block the Chief Judge's (Morton) Court Order."

17. Petitioner takes no issue here with any actual finding made by the state appellate opinion on the facts or evidence before it.

18. This motion and its resolution are not put before this Court by this Petition. But the point is necessary to properly illustrate the pernicious result of the petitioned-from

Footnotes Con't

(h) **ARGUMENT**

Petitioner's argument is short and drawn from authorities far more eloquent than counsel. The excellent section of the opinion by Judge Rice in **Bronson v. Bd. of Education, Etc.,** 535 F. Supp. 846 (S.D. Ohio, 1982), entitled "Collateral Estoppel: General Principles and Necessary Inquiries" lucidly summarizes the law at the starting point of the United

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departure from accepted and usual judicial procedure in the question of the summary sua sponte collateral estoppel by paraphrasing.

While it is not at issue here and Petitioner makes no effort toward a review of it here, the reasoning of this (March 5, 1984) Order would appear to be plain error under **Standard Oil Company of Cal. v. United States,** 429 U.S. 17, 50 L.Ed.2d 21, 97 S.Ct. 31 (1976), and its reported progeny. On an identical question the Fourth Circuit held in **Patterson v. American Tobacco Co., et al (4th cir. 1980):**

> "...However, we do not think that the record before the district court when it ruled upon the motion justified its specific conclusion ... Certainly there are not in the record before us express findings of fact that would support such a conclusion. Whether there is evidence sufficient to support the requisite findings of fact is doubtful in view of the understanding ... that reigned ... **when the original record was being made.** In consequence, the present record does not permit us to conduct a principled review of the district court's ruling on this point. (Citations omitted).
>
> Because the issue ... only emerged in its present contours after the original record was made, we conclude that the relief invoked by defendants under 60(b) can only be achieved by reopening the record for additional proof **and a new determination of bona fides ...**"

States Supreme Court cases and progresses through Sixth Circuit examples in which the principles have been applied.

In the strict sense, the reference in the **Bronson** opinion's sub-section title," ... **Necessary Inquiries**" dramatizes the "**departure** from the accepted and usual course of judicial proceedings" contemplated in Supreme Court Rule 17 (.1) (a) and which is seen in the instant example.

The Sixth Circuit made **no inquiry whatever.**

The opinion from which this petition arises states no principles of collateral estoppel which could justify the unfair result dealt the Petitioner, and instead cited **Commissioner v. Sunnen**, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948) without comment and without even a citation to **Montana v. United States**, supra, 440 U.S. 147 (1979). It made no acknowledgement of the "two additional questions, both of which must be resolved favorably to the party asserting estoppel[19], before the doctrine is appropriately invoked", **Bronson**, supra, 535 F. Supp. at 897.

This Court explained in Montana v. United States, supra, 440 U.S. at 155:

> "In all cases ... where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, **the inquiry must always be to the point or question actually litigated and determined** in the original action, **not what might have been thus litigated and determined.** Only upon such matters is the judgment conclusive in another action."

Upon the same quoted principle, **Bronson**, supra, 535 F. Supp. at 896, summarized:

> "If the inquiry discloses that the issues sought to be litigated in the second action were not actually litigated and determined in the prior suit, or are **not identical** thereto, the doctrine of collateral estoppel is **inapplicable.**"

The **Bronson** opinion set out examples which brightly illuminate the wide departure from the usual and accepted course of judicial proceedings dealt Petitioner:

> "The Sixth Circuit has also recognized the necessity of flexibility in the application of the doctrine of collateral estoppel...
>
> If the issues are not the same or were not actually litigated and determined in the first proceeding, the doctrine of collateral estoppel is inapplicable. If, however, all or some of the issues raised in the second action were actually litigated and determined in the prior action, the doctrine technically applies, but further inquiry is required in order to determine the extent to which the doctrine is appropriately invoked. ...a final inquiry is conducted to consider whether the circumstances of the case are such that a departure from the 'normal rules of preclusion' is war-

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19. No party asserted an estoppel and no party undertook or met the burden of showing the requirements had been met. The estoppel was applied summarily, sua sponte, with no resort to the record of the state proceeding, no comment or analysis on issues or findings, and in a chronology in which the "prior" proceeding was concluded subsequent to the "subsequent" proceeding.

> ranted. If no special circumstances can be discerned, then the general principles under the doctrine of collateral estoppel are controlling and the parties are properly foreclosed from relitigating issues that were actually litigated and determined in the first action."

Ironically, the Sixth Circuit Court itself has remanded cases to lower courts with express recognition and instructions that **the entire state court record must be examined** to determine if an issue was actually litigated and decided, and has expressly instructed that a look at the state court judgment alone is not sufficient. **Spilman v. Harley**, 656 F. 2d 224 (6th Cir. 1981).

And in a case involving Tennessee law the Sixth Circuit emphasized that collateral estoppel operates as a bar only as to issues which were actually litigated and determined in the former suit. **Harrison v. Bloomfield Building Industries, Inc.**, 435 F.2d 1192 (6th Cir. 1970).

The following excerpts from Petitioner's brief submitted in the Sixth Circuit bring the departure and denial of due process squarely into focus with the facts portrayed above in the Statement of the Case:

> "Before passing to another area the attention of the Appellate Court is directed to the "private acknowledgments" which Hardin made to Tennessean representatives while officially maintaining a "no comment" facade. This is seen in the Complaint, in the tenth paragraph.[13]
>
> > 'Later, Hardin privately acknowledged that he ... was enraged when he found out

> that Windsor testified in court about the assistant attorney's attempts to block the chief judge's court order.'
>
> More distressing is the fact that Hardin knew there had never been such an order from the chief judge.

"In **Colpoys v. Gates,** 118 F. 2d 16, (D.C. Cir. 1941) a United States Marshal was sued ... by a Deputy Marshal who had been compelled to resign because of false accusations appearing in newspaper articles. He made the statement to the newspaper, that the plaintiff was asked to resign 'because of things that occurred before' ... etc., (and much less damaging to the subordinate than Hardin's "private acknowledgements" that he was "enraged" and inferring Windsor's "attempts to block the chief judge's order".) The **(Colpoys)** court stated:

> 'It was his duty to investigate charges, if any were made, against his deputies. It was not his duty to publicly discuss their dismissal or to publicly explain the reasons

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13. Remembering that the agency has not been sued, that the Deputy Attorney General (who was the only person who could have terminated the employment and who compelled the resignation) has not been sued, and that Windsor has not sought reinstatement or restoration of the employment, nontheless, have not Hardin's "private acknowledgments" concerning Windsor amounted to a public damaging of Windsor's "liberty interest", or in simple terms his right to fundamental fairness? Was not Hardin functioning as an agent of the federal government when he made his "private acknowledgments", the extent of which could not be explored inasmuch as the District Court stayed discovery efforts?

> for it.[14]. He had no duty to tell the public anything about them ... In the cases which have extended an absolute immunity to administrative officers without policy-determining functions, the thing held to be privileged has usually if not always been an act in the general line of duty, not a separate discussion or statement.'

In **Colpoys** (supra) the appellate court allowed the lawsuit to proceed."

... "Similarly, in **Kendall v. Board of Ed. of Memphis City**, 627 F.2d 1 (6th Cir. 1980) this Court stressed:

> "... (anything) More than the mere fact of her discharge is public knowledge. ... Thus, Kendall has established the presence of a liberty interest."

"The action taken by Deputy Renfrew is analagous to the case where 'the act induced by the defendant would have been a tort or a crime had the third person (Renfrew in this case) had his (Hardin's) knowledge, for instance, the innocent giving of a poisoned apple" presented by Justice Holmes in the Harvard Law Review Article." **(Privilege, Malice, and Intent,** Vol. VII, Harvard Law Review, page 1, April 25, 1894, by Oliver Wendell Holmes, Jr.)"

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14. In this case, the article (Complaint, Ex. D) emphasized in its fifth paragraph, "Some of the events which culminated in Windsor's decision" and proceeded to link Hardin's "later...acknowledgments"...

CONCLUSION

Petitioner humbly asks this Court to grant this Petition for some meager relief from this interlocking and self-fulfilling web of unfairness and denial of basic due process in which he may otherwise remain trapped and unheard. With only a written page or even a paragraph from this Court, Petitioner can exchange a decision in which the most important truths have been locked outside for one, whatever its result, in which they may enter and be seen. These principles framed in the questions of this case are indeed of great importance to the public.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 1984, I served the foregoing Petition for Writ of Certiorari by causing copies to be mailed, first class, postage prepaid, to:

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